

# **MOTOR MONDAY**



**Monday, August 9, 2021**

## **HOW TO REVIEW A DUI: LOOKING FOR PITFALLS AND KEEPING AN EYE TOWARDS TRIAL**

Presented by:

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Flagstaff City Attorney's Office


Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
3838 N. Central Ave., Suite 850  
Phoenix, Arizona 85012


ELIZABETH BURTON ORTIZ  
EXECUTIVE DIRECTOR




WHERE TO BEGIN.....  
THE CITATION




NAME



DATE OF BIRTH



DATE OF OFFENSE



TIME OF OFFENSE

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DEFENDANT'S NAME

Check for accuracy

- Citation, reports and your case management system.

Run Criminal History

- Public Access, NCIC and MVR.
- Look for prior DUIs and DOSL convictions.
  - Order certified prior DUI convictions.
  - Add reminder to file Motion to Allege Prior DUI.

**\*\*PRACTICE TIP: Verify the certified conviction packet is complete\*\***

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DATE AND TIME OF OFFENSE



- **Checking for discrepancies between reports, citation and your case management system.**
- **Verifying results collected within 2 hours.**

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TIME OF OFFENSE

Month	Day	Year	Time	Speed	Approx	Posted	B&P	Speed Vsuren,ae,Spevice	Jet cost	Insert Na of Town or	State
04	12		1:25 PM	35	35	35	35	Butler & S.. AA; 14un gs4-		County k 40.	C
The defendant committed the following:											
Violation Domestic Violence											
IRS1/140) Aped na *tette.-											
Disp. Codes Date of Disposition Sanction											
P5e3 (10) CC											
lia/Pt3u my sta Mm Wice las yr li, Silc: Ajence 0											
Disp. Codes Date of Disposition Sanction											
PtCre4.) * P. ail											
q Municipal											
10 Civil • Me											
- 120P											
Municipal											
q Civil Traffic 0											

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Synopsis:

On 04/12/2018 at approximately 1202 hours Jake was arrested at 605 Route 66 Flagstaff, AZ during a traffic stop for a DUI.

Narrative:

On 04/12/2018 at approximately 1202 hours, I was working as "Adam 41" and driving patrol vehicle #2238. I was in full uniform and wearing my AXON body camera. For further detail refer to AXON video footage.

I was traveling west bound on Butler Avenue towards Milton Rd. I came to a stop at a red light in the number 2 left turn lane behind a red Dodge pick u license late number BB21742. The Dod e t ick us turned left on green ht onto Milton Road air southbound. I obs

number 2 lane (ori At approximately 0008 hours, I responded to a request for an additional officer at 605 W Route 66. Upon arrival, I found Officer Perez conducting field sobriety tests on a male subject, identified to me as Jake Please see Officer Perez narrative for further,

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PRACTICE TIPS

 Make note of any discrepancies on review sheet/report.

 When in doubt about timeline, order Background Event Chronology

 Draft Motion to Amend ASAP

Make sure to have officer explain during defense interview.

Rule 13.5  
State v. Brown, 125 Ariz. 421 (1980)  
Rule 13.5(b), that the contents of State v. Brown, 125 Ariz. 421, 115 P. 3d (2009)

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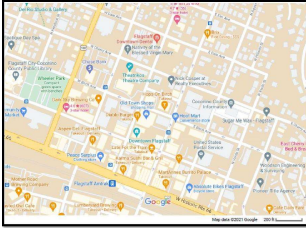
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## LOCATION



- Google Maps if unfamiliar with the location or if map will help jury understand the case.
- Save the map to your file—will likely need for trial.
- Print to PDF.
- Include on R15 notice.

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## WITNES S LIST

Update as you review case

### Availability of Witnesses

- Retired? Move? Brady list?
- Can you proceed without the witness?
- Timing of disclosure.

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## REVIEW FORM

Name: John Doe Case No: CM20201-0123  
DOB: 09-15-1999 Defense Atty: Jane Smith Witnesses:

Reporting Party: Betty Joe  
Stop Officer: Officer West  
Assisting Officers: Corporal North (Brady list)  
Phlebotomist: none  
Forensic Scientist: none  
QAS (Intox): Bob Jones (no longer with FPD)  
Victim: none  
Other Witnesses:

Update as you  
review....and flag issues as  
you spot them

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### CHARGES

- Did the officer cite to the correct statutes?
  - Correct technical errors with a Motion to Amend (Rule 13.5)
- Does the citation cover everything?
  - Do you need to file additional charges? New complaint?
  - Should you refer for Felony prosecution?
  - Should you agree to not file additional charges?
- Should you allege prior DUI convictions?

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### STOP OR CONTACT

- What caught the officer's attention?
- What is the reason Defendant was stopped? Why contact Defendant?
  - Also note driving behavior post initiation of stop
- **Reasonable Suspicion**
  - *Terry v. Ohio*, 392 U.S. 1 (1968)
  - *Florida v. Royer*, 460 U.S. 491 (1982)
  - *Navarette v. California*, 572 U.S. 393 (2014)

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### TRAFFIC STOP

It is constitutionally permissible for a police officer to stop and detain any person for an actual or suspected violation of Title 28.

- A.R.S. §13-3883(B)
- A.R.S. §28-1594
- *Whren v. United States*, 517 U.S. 806 (1996)
- *State v. Acosta*, 166 Ariz. 254 (App. 1990)
- *State v. Duffy*, 247 Ariz. 537 (App. 2019)

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## EXTENDED STOP...AKA SWEENEY



State v. Sweeney, 224 Ariz. 107(App 2010).

A stop cannot last longer than necessary to effectuate the purpose of the stop. Cannot continue to hold driver unless

1. encounter becomes consensual or
2. during the encounter the officer develops reasonable suspicion that criminal activity is afoot.

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## CRACKED WINDSHIELD



- A.R.S. §28-921
- State v.Vera, 196 Ariz. 342 (App. 1999)

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## TAILLIGHTS



- A.R.S. §28-925(A)
- State v. Becerra, 231 Ariz. 200 (App. 2013)

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## LICENSE PLATE LIGHT



*State v. Kjolsrud*, 239 Ariz. 319 (App. 2016)

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## SPEEDING



- A.R.S. §28-701 through A.R.S. §28-710
- *State v. Box*, 205 Ariz. 492, 496 (App. 2003)
- *State v. Acosta*, 166 Ariz. 254 (App. 1990)

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## Weaving or Unsafe Lane Use



- *State v. Livingston*, 206 Ariz. 145 (2003)  
 “Traffic stops based on facts that neither constitute a violation of the law nor constitute reasonable grounds to suspect the driver has committed an offense ... run afoul of the Fourth Amendment.”
- *State v. Gutierrez*, 240 Ariz. 460 (2017) valid stop due to the totality of D’s conduct and believe DUI.

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## MISTAKE OF FACT

Officer believed

- Window tint was too dark
- Plates were expired or suspended
- Vehicle had no plates



*State v. Moreno*, 236 Ariz. 347 (App. 2014)

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## 911 CALLS



- *Anonymous Tips*  
*Navarette v. California*, 572 U.S. 393 (2014)
- *Citizen Informant*  
*Pharo v. Tucson City Court*, 167 Ariz. 571 (App. 1990)

\*\*\*Practice tip: Order 911 call asap!\*\*\*

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## NOT A STOP.....A CONSENSUAL ENCOUNTER

*Florida v. Bostick*, 501 U.S. 429 (1991)

*State v. Robles*, 171 Ariz. 441 (App. 1992)

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## COMMUNITY CARE TAKING

*State v. Organ, 225 Ariz. 43 (App. 2010)*

*Cady v. Dombrowski, 413 U.S. 443 (1973)*

**\*\*Practice tip: If medics or fire were called out, get copies of their reports, too.**

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## ACTUAL PHYSICAL CONTROL

☐ *State v. Zaragoza, 221 Ariz. 49 (2009)*

☐ In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. Whether the vehicle was running;
2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle's headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioner was on;
12. Whether the windows were up or down;
13. Any explanation of the circumstances shown by the evidence.

· Document these factors in your case summary

· Was car in gear?  
· See back up lights come on?  
· What happened as soon as LEO woke D?

· If report is lacking, use this as a training opportunity with your officer(s)

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## ACTUAL PHYSICAL CONTROL

*Zaragoza continued:*

This list is not meant to be all-inclusive. It is up to you to examine all of the available evidence and weigh its credibility in determining whether **the defendant actually posed a threat** to the public by the exercise of **present or imminent control** of the vehicle while impaired.

If the APC case arises out of a DUI Collision, note whether the officer confirmed driver *drank nothing* after the collision

**BONUS: can Defendant be found guilty of DUI on private property?**

**Yes! *Allen v. Girard, 155 Ariz. 134 (App. 1987)***

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<p>Name: John Doe Case No: CM20201-0123          DOB: 09-15-1999 Defense Atty: Jane Smith</p> <p>Witnesses:</p> <p>Reporting Party: Betty Joe          Stop Officer: Officer West          Assisting Officers: Corporal North          Phlebotomist: none          Forensic Scientist: none          (SAS (Intox): Bob Jones (no longer with FPD)          Victim: none          Other Witnesses:</p> <p>Charges: Wrong Way on One Way 28-728(B)          DUI Slightest - 8-1381(A)(1)          DUI 0.08+ - 8-1381(A)(2)          Extreme DUI 12B-1382(A)(1)</p> <p>Date: 7/10/2021 Time: 0329am Location: E. Aspen St/N. Beaver St,</p> <p>Reasons for Stop:</p> <ul style="list-style-type: none"> <li>Wrong way on Aspen</li> </ul>	<h2>REVIEW FORM</h2> <p>Fill out as you review the case</p>
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<p>Criminal History</p> <ul style="list-style-type: none"> <li>FJC TR2018-2399 DUI (and hit and run--dismissed) Filed 3/19/2018 Disposition Date 6/27/201</li> <li>FJC CT2020-2705 Speeding (defensive driving) To Do</li> </ul> <p>List:</p> <ul style="list-style-type: none"> <li>File Motion to Amend—Fix pg.</li> <li>Order Event Chronology</li> <li>Order Prior DUI conviction</li> <li>File Allegation of Prior DUI upon receipt</li> <li>Order 911 recording</li> <li>Order Body Camera videos: and download</li> </ul>	<h2>REVIEW FORM</h2> <p>Fill out as you review the case</p>
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<h2>INITIAL CONTACT</h2> <ul style="list-style-type: none"> <li>Defendant's statements</li> <li>Signs and symptoms of impairment             <ul style="list-style-type: none"> <li>Odors</li> <li>Eyes</li> <li>Speech</li> <li>Dexterity issues</li> </ul> </li> <li>Exit car</li> </ul>	
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## FIELD SOBRIETY TESTS

- What to look out for:
  - Did the officer ask the prequal questions before starting the tests?
  - Document injuries D mentions.
  - HGN—Certified? Only Qualified?
  - Conditions under which tests were performed?
  - Do you have all the DUI report and supplements?

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FLAGSTAFF POLICE DEPARTMENT									
ALCOHOL INFLUENCE OFFENSE									
SUBJECT'S NAME <u>LAT, JEFFREY</u>		DATE <u>1/11/91</u>		TIME ADMINISTERED <u>11:15 A.M.</u>		OFFICER <u>P/O J. J. 391</u>			
STATION <u>STAN</u>		COLD SOBRIETY TEST GUIDELINES							
1. Morning Case History		2. Walk & Turn		3. Horizontal Gaze Nystagmus		4. Finger Count		5. Altered Judgment	
<p><b>WHAT TO OBSERVE:</b></p> <ul style="list-style-type: none"> <li>A. Remote</li> <li>B. Near</li> <li>C. Contact</li> <li>D. Walk</li> <li>E. Follow-through</li> <li>F. Gaze</li> </ul>		<p><b>WHAT TO BEAT:</b></p> <ul style="list-style-type: none"> <li>A. Feet together</li> <li>B. Arms straight</li> <li>C. Feet together</li> <li>D. Arms straight</li> <li>E. Walk in a straight line</li> <li>F. Head in a straight line</li> </ul>		<p><b>WHAT TO SAY:</b></p> <ul style="list-style-type: none"> <li>A. Feet together</li> <li>B. Arms straight</li> <li>C. Feet together</li> <li>D. Arms straight</li> <li>E. Walk in a straight line</li> <li>F. Head in a straight line</li> </ul>		<p><b>WHAT TO SAY:</b></p> <ul style="list-style-type: none"> <li>A. Feet together</li> <li>B. Arms straight</li> <li>C. Feet together</li> <li>D. Arms straight</li> <li>E. Walk in a straight line</li> <li>F. Head in a straight line</li> </ul>		<p><b>WHAT TO SAY:</b></p> <ul style="list-style-type: none"> <li>A. Feet together</li> <li>B. Arms straight</li> <li>C. Feet together</li> <li>D. Arms straight</li> <li>E. Walk in a straight line</li> <li>F. Head in a straight line</li> </ul>	
OBSERVATION 1		OBSERVATION 2		OBSERVATION 3		OBSERVATION 4		OBSERVATION 5	
<p>1. Left eye does not follow</p> <p>2. Right eye does not follow</p> <p>3. Both eyes do not follow</p> <p>4. Head bobs</p> <p>5. Head turns</p> <p>6. Head jerks</p> <p>7. Head shakes</p> <p>8. Head wags</p> <p>9. Head bobs</p> <p>10. Head turns</p> <p>11. Head jerks</p> <p>12. Head shakes</p> <p>13. Head wags</p> <p>14. Head bobs</p> <p>15. Head turns</p> <p>16. Head jerks</p> <p>17. Head shakes</p> <p>18. Head wags</p> <p>19. Head bobs</p> <p>20. Head turns</p> <p>21. Head jerks</p> <p>22. Head shakes</p> <p>23. Head wags</p> <p>24. Head bobs</p> <p>25. Head turns</p> <p>26. Head jerks</p> <p>27. Head shakes</p> <p>28. Head wags</p> <p>29. Head bobs</p> <p>30. Head turns</p> <p>31. Head jerks</p> <p>32. Head shakes</p> <p>33. Head wags</p> <p>34. Head bobs</p> <p>35. Head turns</p> <p>36. Head jerks</p> <p>37. Head shakes</p> <p>38. Head wags</p> <p>39. Head bobs</p> <p>40. Head turns</p> <p>41. Head jerks</p> <p>42. Head shakes</p> <p>43. Head wags</p> <p>44. Head bobs</p> <p>45. 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Head turns</p> <p>91. Head jerks</p> <p>92. Head shakes</p> <p>93. Head wags</p> <p>94. Head bobs</p> <p>95. Head turns</p> <p>96. Head jerks</p> <p>97. Head shakes</p> <p>98. Head wags</p> <p>99. Head bobs</p> <p>100. Head turns</p>		<p>1. Left eye does not follow</p> <p>2. Right eye does not follow</p> <p>3. Both eyes do not follow</p> <p>4. Head bobs</p> <p>5. Head turns</p> <p>6. Head jerks</p> <p>7. Head shakes</p> <p>8. Head wags</p> <p>9. Head bobs</p> <p>10. Head turns</p> <p>11. Head jerks</p> <p>12. Head shakes</p> <p>13. Head wags</p> <p>14. Head bobs</p> <p>15. Head turns</p> <p>16. Head jerks</p> <p>17. Head shakes</p> <p>18. Head wags</p> <p>19. Head bobs</p> <p>20. Head turns</p> <p>21. Head jerks</p> <p>22. Head shakes</p> <p>23. Head wags</p> <p>24. Head bobs</p> <p>25. Head turns</p> <p>26. Head jerks</p> <p>27. Head shakes</p> <p>28. Head wags</p> <p>29. Head bobs</p> <p>30. Head turns</p> <p>31. Head jerks</p> <p>32. Head shakes</p> <p>33. Head wags</p> <p>34. 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### FIELD SOBRIETY TESTS—Bonus Reminders

- *Miranda* warnings are not required prior to administering FSTs (even if conduct tests post-arrest).
- Officers may testify about defendant's performance on the tests. *Fuenning v. Superior Court*, 139 Ariz. 590 (1983).
- Trial Court cannot limit the Prosecutor from describing Field Sobriety Tests as "Tests." *Sate v. Campoy*, 214 Ariz. 132 (App. 2006).
- Refusal to submit to FSTs is admissible at trial. *State ex. rel. Verburb v. Jones*, 211 Ariz. 413 (2005).

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Name: John Doe Case No: CH20201-0123  
DOI#: 09-15-1999 Address: Apt. Jane Smith

#### Witnesses

Reporting Party: Betty Doe  
Investigating Officer: Officer Mike  
Assisting Officer: Corporal North  
Photographer: none  
Forensic Examiner: none  
QA/Review: Bob Jones (no longer with PDI)  
Victim: none  
Other Witnesses:

Charges: Wrong Way on One Way 28-729(B)  
DUI: Refusal 28-13C2(A)(1)  
Entrance DUI 28-13C2(A)(1)

Date: 7/4/2021 Time: 03:28am Location: E. Aspen St/N. Beaver St.

#### Reason for Stop:

Wrong way on Aspen

#### Initial Contact

- Strong odor of alcohol in vehicle
- Driver OK with heading to officer
- Designated driver and driving drunk home
- Breathalyzer superior 0.08
- Blood sample
- Holds on to car as reporting to officer

#### DUI

- Request Questions? *Not done* Inquiries? *Completion of Inquiries*
- GCU? *Not done* or *Not Certified*? *Not documented*
- W.A.R. *Not done*
- C.A.R. *Not done* for safety reasons
- Others: *Not done*

Arrest: Arrested for DUI at 03:45am

### REVIEW FORM

Continue to fill out as you  
review the reports.

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### ARREST



- Probable Cause?
- What was Defendant arrested for?
- Statements during transport
- Mirandized? When?
- Questioned?
- Invoke Right to remain silent?
- Invoke Right to counsel?
- 5<sup>th</sup> or 6<sup>th</sup> Amend right

Note all concerns on your summary sheet and or police report

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**PROBABLE CAUSE**

- Officer has probable cause when reasonably trustworthy information and circumstances based on specific and articulable facts with rational inferences, would lead a person or reasonable caution to believe the suspect has committed an offense.
- *Kaley v. United States*, 571 U.S. 320, 338 (2004); *Mayland v. Pringle*, 540 U.S. 366, 371 (2003); *State v. Haskins*, 199 Ariz. 127 (2000); *State v. Yule*, 196 Ariz. 324 (App. 2000); *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Gerszten v. Pugh*, 420 U.S. 103, 111-112, 120-121 (1975); *Brennan v. United States*, 338 U.S. 160, 175-176 (1949).
- Arresting officer does not have to witness the offense. Can rely on collective knowledge of officers, rely on observations of civilian witnesses, and consider inconsistencies in a defendant's statements.
- *State v. Keener*, 206 Ariz. 29, 31-32 (App. 2003); *State ex. Rel. McDougall v. Superior Court In & For City of Maricopa*, 191 Ariz. 182 (App. 1997); *State v. Lawson*, 144 Ariz. 547, 553 (1985); *State v. Harris*, 31 Ariz. 488 (1962); *Callison v. City of Phoenix*, 120 Ariz. 165, 167 (1975); *State v. Taylor*, 112 Ariz. 68 (1975).
- Also take into consideration the officer's training and experience.
- *State v. Moran*, 232 Ariz. 528 (App. 2013); *State v. Superior Court (Biske)*, 149 Ariz. 269, 275 (1986).

## IMPLIED CONSENT AND ADMIN PER SE

- A.R.S. §28-1321
  - A person who operates a vehicle in Arizona gives consent to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if **arrested** for any offense arising out of acts alleged to have been committed while the **person was driving or in actual physical control** of a motor vehicle while under the influence of intoxicating liquor or drugs.
- **Do not have to establish voluntarily consented to test.** *Diaz v. Bernini*, 246 Ariz. 114 (2019).
- What about **refusals**?
  - The provisions of the implied consent statute become operative only **after** a person is arrested for DUI offense.
  - Before an arrest, the implied consent statute does not apply. A person **may voluntarily agree to a blood test** and is free to refuse.

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# Apar

Motor Vehicle Division  
NO RP's or a dotzogen

Mail Drop 533M  
PO Box 1200  
Phoenix AZ 85001-2100

## ADMIN PER SE / IMPLIED CONSENT AFFIDAVIT

CN or DS Case Number 71fir - 03W

Lieutenant Issues Issued

urges: OARS 26-1361 0 26-1362 9 26-1363 0 4-244-34 0124261 C1 Yes 0 While transporting hazardous material? CARS 28-1011  
C1-1204 0 Other Title 13. Chapter 11 Charge: 0 Yes C3 No While operating a commercial motor vehicle?


Name (last, middle, last suffix) Rafael Date of birth 7/11 Driver License Number [redacted] Class State FL  
id#d535 City Orlando State FL Letter-I-Fir 71001

a) date 3/11, at time 16:00, at location Golf cart # 6.  
I had probable cause to believe that the person named caused or was cited for an accident resulting in death or serious physical injury while driving a motor vehicle. (State the probable cause or citation.)  
I had reasonable grounds to believe the person named was driving or in actual physical control of a motor vehicle while under the influence of intoxicant and/or drugs, and I placed the named person under arrest.  
among the following persons: 71014 0 04c 15044 cm 1 JVA (Thor-Srt7) CoTtp pillo co. 71r.rie  
04t tr 1r Ld Acc To Bad, r f td., c, PPA


If the person submitted to a breath alcohol test: CARI Cs)  
Test results: CARI Cs indicated concentration of: Indicated positive? 71r.rie # 6 2 120 CM "Firuq" if B Results not available

3 The person refused to take or did not complete the tests in the following manner:

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 Mail Drop 533M Motor Vehicle Division PO Box 2100 Phoenix AZ 85001-2100		<b>ADMONITIONS</b> 16-71	
(f) Prior to reading the below admonitions, I ensured the suspect had been placed under arrest for at least one of the following charges: ARS 28-1381, ARS 28-1382, ARS 28-1383, ARS 4-244.34, ARS 13-1201, ARS 13-1204, other Title 13, Chapter 11, charge.			
<b>ADMONITIONS</b> I Will you consent to a test or tests of your blood, breath, one or other bodily substance for the purpose of determining your alcohol concentration or drug content? Yes <input type="checkbox"/> No <input type="checkbox"/>			
<b>READ ONLY IF THE ARRESTEE CONSENTS TO TESTING:</b> (g) If the test results are not available or indicate an alcohol concentration of 0.08 or above 10.04 or above (in a commercial vehicle) or indicate any drug defined in ARS 13-3401 or its metabolite without a valid prescription, then your Arizona driving privilege will be suspended for not less than 90 consecutive days.			
Will you consent to the tests? Yes <input type="checkbox"/> No <input type="checkbox"/>		(h) If you do not expressly agree to testing or do not successfully complete the tests, your Arizona driving privilege will be suspended for 12 months, or for two years if you've had a prior implied-consent refusal within the last 84 months.	
Arrestee's Comments:		(i) If the test results are not available or indicate an alcohol concentration of 0.08 or above 10.04 or above (in a commercial vehicle) or indicate any drug defined in ARS 13-3401 or its metabolite without a valid prescription, then your Arizona driving privilege will be suspended for not less than 90 consecutive days.	
		(j) Alcohol or drug screening must be completed before your privilege may be reinstated. Will you consent to the tests? Yes <input type="checkbox"/> No <input type="checkbox"/>	
		(k) If the arrestee unreasonably delays the completion of the test, read the following to the arrestee: (l) If the arrestee unreasonably delays the completion of the test, read the following to the arrestee: Will you consent to the tests? Yes <input type="checkbox"/> No <input type="checkbox"/>	
		Arrestee's Comments:	

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 FLAGSTAFF POLICE DEPARTMENT 16-71	
Suspect Name: _____	
<b>You have been arrested for driving or being in actual physical control of a motor vehicle while under the influence of alcohol or drug, a violation of the following charge(s):</b> (Read only those that apply) ARS 28-1381, ARS 28-1382, ARS 28-1383, ARS 4-244.34, ARS 13-1201, ARS 13-1204, other Title 13 Chapter 11 charge.	
Understanding that you have the right to refuse consent, will you consent to a test or tests of your blood or breath to determine your alcohol concentration or drug content? Yes <input type="checkbox"/> No <input type="checkbox"/>	
TO THE OFFICER: If the suspect refuses or does not successfully complete the specified tests, read the following to the suspect: If you refuse or do not successfully complete the tests, your Arizona driving privilege will be suspended. The suspension will be requested for 12 months, or for two years if you have had a prior refusal to submit within the last 84 months. Will you consent to testing? Yes <input type="checkbox"/> No <input type="checkbox"/>	
TO THE OFFICER: If the arrestee unreasonably delays the completion of the test, read the following to the suspect: Further delay will be considered a refusal to submit to the tests. Will you consent to testing? Yes <input type="checkbox"/> No <input type="checkbox"/>	
ADDITIONAL COMMENTS: _____	
OFFICER'S SIGNATURE: _____ Date: _____	

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<b>DUPLICATE OR INDEPENDENT TEST ADVISORY</b>	
A.R.S. §28-1388	
A DUI suspect has a separate and distinct due process right to obtain an independent test at the suspect's own expense to refute the state's evidence, whether from scientific tests or otherwise. <i>Mack v. Cruikshank</i> , 196 Ariz. 541 (App. 1999).	
State may not unreasonably interfere with a suspect's opportunity to obtain an independent test. But, the State does not have to release the defendant to accommodate. <i>Van Herreweghe v. Burke ex rel. County of La Paz</i> , 201 Ariz. 387 (App 2001).	
Do not have to have a signed waiver of right to independent test; defendant's conduct can be evidence of waiver to right to independent test.	
State v. Goodwin, 160 Ariz. 366 (App. 1989). State v. Crotty, 152 Ariz. 264 (App. 1986).	

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## INTOXILYZER PERMIT

Operator Permit Number 50696

This is to certify that  
**Elijah Kim**  
 has met the requirements for issuance of this permit for the operation  
 of the **Intoxilyzer 8000**  
 First Issued: 11/13/2018  
 Issued: 11/13/2018  
 Expires: 11/13/2023  
 ---LfnS  
**C**  
 Director, Arizona Department of Public Safety



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### STANDA 80 OPERATIONAL PROCEDURE

#### DUPLICATE BREATH TEST

WARRANT # 11/24 OK

AGENCY OK

INSTRUMENT SERIAL # 11/24 OK

TEST RESULTS O 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

AT TIME 11/24 OK

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Operational Checklist Intoxilyzer Printout

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## DEPRIVATION PERIOD

"At least a 15-minute period immediately prior to a duplicate breath test during which period the subject has not ingested any alcoholic beverages or other fluids, eaten, vomited, smoked or placed any foreign object in the mouth." Ariz. Admin. Code R13-10-101(8).

How did the officer document the deprivation period in the report?


- Defendant use the restroom?
- Defendant contact lawyer?
- Defendant drink water?
- Was defendant crying? coughing?

Does not require **direct observation** entire time.

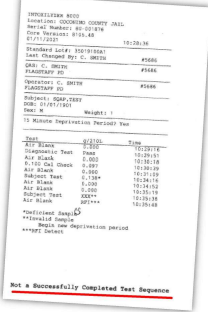
*Ricard v. Arizona Department of Transportation, 187 Ariz. 633 (App. 1997)*

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### BREATH TEST



- Error Codes?
- Completed test?
- More than one test?

- If don't have all the completed tests make note that you need to order the missing print out(s)

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### BREATH TEST

#### Admission of Results Under Rule 702

- Statutory method is an alternative to admission under Rules of Evidence.
- Breath Test Results are still admissible as long as the State can meet the foundational requirements of the rules of evidence.  
*State v. Rodriguez*, 173 Ariz. 450 (App. 1992)

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### REVIEW FORM - BREATH TEST

Testing (blood, breath/urine)

- Breath:
  - o Depuration Period?
  - o Instrument
  - o Times and Result
- Blood:

Warrant? Number: \_\_\_\_\_

INTOXILYZER 8000 1

Call= COCONINO COUNTY JAIL  
 Serial Number: 80-001876  
 Conversion: .lit).4t5 01/24/2021

17:56:16

Test g/21 OL Time

QAS: C.	Air Blank	0.000	17:57:43
FLAGSTAF	Diagnostic	Pass	17:58:19
	Test Air Blank	0.000	17:58:46
Op. ator	0.100 Cal	0.096	17:59:07
FLAGS F	Check Air	0.000	17:59:36
Subject: [Signature]	Blank Test	0.153	18:00:08
Sex: [Signature]	Air Blank Wait	0.000	18:00:41
	Air Blank		
15 Minu	Subject Test	0.000	18:05:36
	Air Blank 0.100	0.149	18:06:11
	Cal Check Air	0.000	18:06:44
	Blank	0.095	18:07:05
	Blank	0.000	18:07:34
	Diagnostic Test	Pass	18:08:09

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## REVIEW FORM-BREATH TEST

Testing (blood/breath/urine)

- Breath:
  - Deprivation Period? Done, but **no details in report**
  - Instrument 8000 80-001876
  - Times and Results **& on first test, but don't have copy in file**
    - 18:00:08 0.153
    - 18:06:11 0.149
- Blood:
  - Warrant? Number:
  - Phlebotomist
  - Time
  - Results
    - Report number
    - Forensic Scientist

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## BLOOD DRAW

- Time of draw.
- Who did the draw? Where was it conducted? Was Defendant cooperative?
- Copy of phlebotomy draw report?
- Consensual or warrant?
  - Have complete warrant?
- Copy of lab report?
  - Criminalist...still around?
  - Have you ordered lab notes? Resume?

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## PHLEBOTOMY BLOOD DRAW

1-1 ACHSAP POLICE BED PATIENT		OR NUMBER	
PHLEBOTOMY BLOOD DRAW REPORT		PR- /57-7	
NAME: /S/9-.e.i.'c		DATE OF BIRTH: 7-5-9	
STREET ADDRESS: 200 S. 11th St. C.		STATE: ARIZONA	
CITY: PHOENIX	SEARCH WARRANT: YES / NO	REQUIREMENT: YES / NO	CIRCUMSTANCES: YES / NO
PHLEBOTOMIST (S):	PHLEBOTOMIST (S):	AGENCY: 1-1	
DATE: 10-1-18	TIME: 11:00 AM	BLOOD KIT: 1-1	MANUFACTURER: 1-1
EQUIPMENT USED: 1-1	BLOOD KIT EXPIRATION (MO/YR): 1-1		
BLOOD DRAWN FROM: 1-1		BLOOD KIT EXPIRATION (MO/YR): 1-1	
BLOOD DRAWN FROM: 1-1		BLOOD KIT EXPIRATION (MO/YR): 1-1	

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PHLEBOTOMY BLOOD DRAW			
<b>1. MEDICAL PROBLEMS:</b> <input type="checkbox"/> ALLERGIES <input type="checkbox"/> MEDICATIONS <input type="checkbox"/> BLOOD THINNING MEDICATIONS <input type="checkbox"/> BLOOD THINNING MEDICATIONS <input type="checkbox"/> BLOOD THINNING MEDICATIONS <input type="checkbox"/> BLOOD THINNING MEDICATIONS	<b>2. TYPE OF NON-ALCOHOLIC SITE CLEANER USED:</b> <input type="checkbox"/> PREPARED - 100% <input type="checkbox"/> DETACHED <input type="checkbox"/> NON-ALCOHOLIC CHLORIDE (NAC) BLOOD CLOTTED AT SITE WITHIN MINUTES		
<b>3. PATIENT'S NAME:</b> <u>441 vca 00, 2 6-011, etc.</u>			
<b>4. PATIENT'S ADDRESS:</b> <u>42-111 J. et al. D. J. P. v. S. 4-1</u>			
<b>5. PATIENT'S CITY:</b> <u>CR. At- 14 J</u>			
<b>6. PATIENT'S STATE:</b> <u>2 v. 4, 4</u>			
<b>7. PATIENT'S ZIP:</b> <u>8-111 - Theater) toy.</u>			
<b>8. PATIENT'S PHONE:</b> <u>Prz: 41 12</u>			
<b>9. PATIENT'S SIGNATURE:</b> <u>tur.</u>			
<b>10. PATIENT'S DATE:</b> <u>10/11/20</u>			
<b>11. PATIENT'S TIME:</b> <u>2</u>			
<b>12. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>13. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>14. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>15. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>16. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>17. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>18. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>19. PATIENT'S ID NUMBER:</b> <u>127</u>			
<b>20. PATIENT'S ID NUMBER:</b> <u>127</u>			

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WARRANT	
<ul style="list-style-type: none"> <li>When a DUI suspect refuses to take a test, officer can obtain a search warrant for blood or urine. State v. Clary, 196 Ariz. 610 (App. 2000).</li> <li>Refusal to submit to a blood test was not a statutory prerequisite to obtaining a search warrant under the implied consent statute. State v. Stanley, 217 Ariz. 253 (App. 2007).</li> <li>A.R.S. §13-3911 to A.R.S. §13-3931               <ul style="list-style-type: none"> <li>A.R.S. §13-3913. Must have an affidavit naming the person and property to be seized the and the place to be seized.</li> </ul> </li> </ul>	

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IS YOUR WARRANT COMPLETE?	
<b>AFFIDANT:</b> <u>10/11/20</u> <b>Driver license/privilege is:</b> <u>Valid</u> <b>Additional observations including signs and symptoms of impairment made by Affiant:</b> <u>10/11/20</u>	<b>1. NATURE OF WARRANT:</b> <input type="checkbox"/> Antagonistic <input type="checkbox"/> Substantive <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Cooperative <input type="checkbox"/> Indifferent <input type="checkbox"/> Argumentative <input type="checkbox"/> Vexing or being in actual
<b>2. BASIS OF WARRANT:</b> <input type="checkbox"/> On 10/11/20 at approx 10:00 AM on Milton Rd a vehicle was observed striking this vehicle into a third vehicle on Milton Rd. <input type="checkbox"/> A witness to the collision at this intersection. I arrived at this scene with a "Call" officer. he was very overheard him on the of alcoholic beverage and would not stop or listen to commands. he will remain in the vehicle.	<b>3. BASIS OF WARRANT:</b> <input type="checkbox"/> I believe that it is necessary to obtain this evidence after 10:00 PM and before 6:30 AM, for the reason that it is now 22:46 hours, therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a time delay would render it useless. <input type="checkbox"/> Based on the preceding facts, I <u>Beecbe Benjamin 103172020</u> , your Affiant, request that a nighttime search warrant be issued. <input type="checkbox"/> Pursuant to Maricopa County Superior Court Local Rule 4.10.1, <u>Beecbe Benjamin 103172020</u> , do solemnly swear or affirm that the information located on this affidavit is correct and complete, and that I have personal knowledge of the information on this affidavit.
<b>Affiant:</b> <u>10/11/20</u> <b>(signature) (date &amp; time)</b> <b>Department:</b> <u>103172020</u> <b>(agency)</b>	<b>4. BASIS OF WARRANT:</b> <input type="checkbox"/> I believe that it is necessary to obtain this evidence after 10:00 PM and before 6:30 AM, for the reason that it is now 22:46 hours, therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a time delay would render it useless. <input type="checkbox"/> Based on the preceding facts, I <u>Beecbe Benjamin 103172020</u> , your Affiant, request that a nighttime search warrant be issued. <input type="checkbox"/> Pursuant to Maricopa County Superior Court Local Rule 4.10.1, <u>Beecbe Benjamin 103172020</u> , do solemnly swear or affirm that the information located on this affidavit is correct and complete, and that I have personal knowledge of the information on this affidavit.
<b>Subscribed and Sworn to me this 10/11/2020.</b> <b>Honorable Rodney Mitchell</b> <b>Maricopa County Superior Court</b>	<b>5. BASIS OF WARRANT:</b> <input type="checkbox"/> I believe that it is necessary to obtain this evidence after 10:00 PM and before 6:30 AM, for the reason that it is now 22:46 hours, therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a time delay would render it useless. <input type="checkbox"/> Based on the preceding facts, I <u>Beecbe Benjamin 103172020</u> , your Affiant, request that a nighttime search warrant be issued. <input type="checkbox"/> Pursuant to Maricopa County Superior Court Local Rule 4.10.1, <u>Beecbe Benjamin 103172020</u> , do solemnly swear or affirm that the information located on this affidavit is correct and complete, and that I have personal knowledge of the information on this affidavit.

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**REVIEW FORM**

Testing (blood/breath/urine)

- Breath:
  - o Deprivation Period?
  - o Instrument
  - o Times and Results
- Blood:
  - o Warrant? Number
  - o Phlebotomist
  - o Time
  - o Results
    - n Report number
    - n Forensic Scientist
- Issues?

**SEARCH WARRANT**  
County of Maricopa • State of Arizona

**SEARCH WARRANT # 2020-07281**

TO ANY POLICE OFFICER IN THE STATE OF ARIZONA:

I, Breath, Instrument, of the Flagstaff Police Department, I am authorized to believe that in the blood/body fluids of James Cunningham, Male, DOB: 04/07/2001 located at 911 E. Ironwood Rd., in the County of Coconino, State of Arizona or at any other location within police custody in the County of Coconino, State of Arizona, there is now being possessed or controlled certain property or substance(s) described as intoxicating liquor, drugs, vapor releasing substance, or any combination, together with other fruits, instrumentalities and evidence of a crime which property or things consist of any item or combination any evidence which tends to show a public offense has been committed and being fully described in the affidavit to wit:

a. Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs.

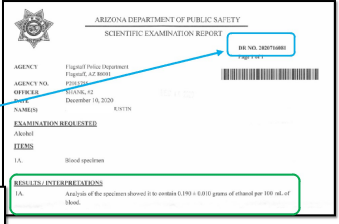
b. Aggravated driving or in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs.

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**REVIEW FORM**

Testing (blood/breath/urine)

- Breath:
  - o Deprivation Period?
  - o Instrument
  - o Times and Results
- Blood:
  - o Warrant? Number:
  - o Phlebotomist
  - o Time
  - o Results
    - n Report number
    - n Forensic Scientist
- Issues?



ARIZONA DEPARTMENT OF PUBLIC SAFETY  
SCIENTIFIC EXAMINATION REPORT

AGENCY: Flagstaff Police Department  
AGENCY NO.: Flagstaff, AZ 86001  
OFFICER: KUTYN, J  
NAMES: KUTYN, J  
EXAMINATION REQUESTED:  
ITEMS:  
1A. Blood specimen

**RESULTS/INTERPRETATIONS**  
1A. Analysis of the specimen showed it to contain 0.190 ± 0.010 grams of ethanol per 100 ml. of blood.

For quantitative values, the uncertainty of the measurement is given at a level of confidence greater than 95%.

Melissa Verhaeghe, MEd, Forensic Scientist  
Northern Arizona Crime Laboratory  
1140 W. Kubie Lane, Flagstaff, AZ 86001  
(928) 775-0487 - melissav@narc.state.az.us

Accredited by the ISO International Standard 15189 by International Standards

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**REVIEW FORM-BLOOD TEST**

Testing (blood/breath/urine)

- Breath:
  - o Deprivation Period?
  - o Instrument
  - o Times and Results
- Blood:
  - o Warrant? Number: SW2020-070281
  - o Phlebotomist Sgt. Lavelle
  - o Time: 1733hrs
  - o Results 0.190
    - n Report number 2020716081
    - n Forensic Scientist Melissa Verhaeghe
- Issues? Bloods conducted at 3 hours and 25 minutes after stop

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## MEDICAL DRAW

- A.R.S. §28-1388(E)
  - "...if a law enforcement officer has probable cause to believe that a person has violated §28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes..."
- To invoke the medical blood draw exception set forth in §28-1388(E), the state must establish:
  1. probable cause existed to believe that the suspect was driving under the influence,
  2. exigent circumstances made it impractical for law enforcement to obtain a warrant,
  3. the blood was drawn by medical personnel for a medical reason, and
  4. the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.

*State v. Nissley*, 241 Ariz. 327 (2017)

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## VOLUNTARY CONSENT

### Defendant is under arrest, but Officer did not read Implied Consent

- Warrantless seizure of defendant's blood is constitutionally permissible if defendant consents to it.
  - *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, (1973)
  - *State v. Groshong*, 175 Ariz. 67, 70-71 (App. 1993)
- The State carries the burden of proving that the consent was, in fact, freely and voluntarily given...and must be more than acquiescence. *Bumper v. North Carolina*, 391 U.S. 543 (1968)
  - Ariz. R.Crim. P. 16.2(b)

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## RETROGRADE

Blood draw conducted more than 2 hours after Defendant was driving.

- **2 HOUR LIMIT**
  - Blood testing need not be completed within the two-hour period, but the State must present evidence relating to the defendant's BAC back to the time of driving.
    - *State ex. rel. O'Neill v. Superior Court (Kankelfritz)*, 187 Ariz. 440 (App. 1996).
- Retrograde analysis is generally considered to be a reliable scientific discipline and courts have considered the methodology and determined that it is reliable.
  - *State ex rel. Montgomery v. Miller*, 234 Ariz. 289 (App. 2014).

Practice Tip: reach out to forensic scientist and get a retrograde opinion sooner than later

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### CRIMINALIST IS NO LONGER AVAILABLE

- Determine if there is sufficient time to have blood retested.
- Can you proceed without lab results?
- Contact lab to obtain "substitute" criminalist.
  - File updated RI5 notice.
  - New criminalist will review the reports and testing and form independent opinion. Exact same process as if Defendant hired an expert to challenge the testing.
    - *State v. Karp*, 236 Ariz. 120 (App. 2014)
    - *State v. Joseph*, 230 Ariz. 296 (2012)
    - *State v. Rogovich*, 188 Ariz. 38 (1997)
    - *State v. Smith*, 215 Ariz. 221, 228 (2007)

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DEFENDANT INVOKED RIGHT TO COUNSEL  
BUT WAS THAT THE 5<sup>TH</sup> or 6<sup>TH</sup> AMENDMENT RIGHT INVOKED?



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### Right to Counsel, *Miranda*, and the 5<sup>th</sup> Amendment

- Defendant does not need to be advised of *Miranda* until (1) in custody and (2) being questioned.
  - If not being questioned, no need to advise.
- During traffic stop, Defendant is not in custody for *Miranda* purposes until the officer formally advised the defendant he was under arrest, handcuffed, and placed in the back of the patrol car.
  - *State v. Stabler*, 162 Ariz. 370 (App. 1989)
- While Officer is processing Defendant and advising of rights, if Defendant exercised right to counsel, all questioning should cease. "Yep, I want a lawyer."
  - *Hiveley v. Superior Ct. of State of Ariz. In & For Maricopa Cty*, 154 Ariz. 572 (1987)

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[illegible]

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